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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 270

NORMAN C. NORMAN,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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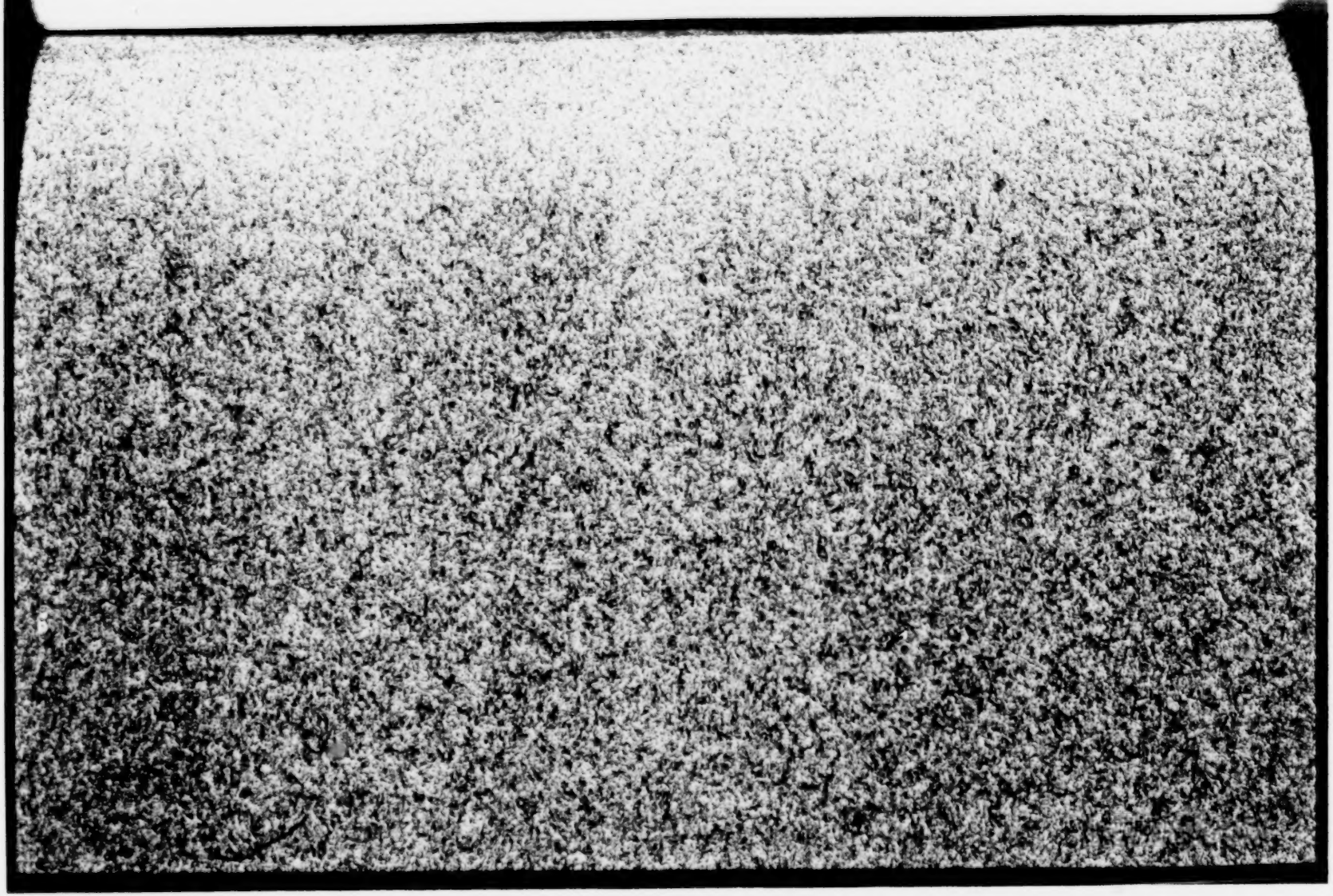
BATAVIA, N. Y.



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THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NORMAN C. NORMAN respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of New York, in the above case, entered July 9th, 1934, upon the remittitur of the Court of Appeals of the State of New York affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, which affirmed a judgment of the said Supreme Court of the State of New York.

A certified transcript of the record in the case including the proceedings in said Court of Appeals is furnished herewith, in accordance with Rule 38, par. 1 of the rules of this Court.

Statement.

On the first day of February, 1930, the petitioner purchased a bond of the Baltimore and Ohio Railroad Company, in the nominal sum of $1,000.00, containing the usual gold clause, that the principal and interest when they matured were payable in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930. (R. 6.)

By the terms of the bond the Baltimore and Ohio Railroad Company agreed to pay to the holder, interest at the rate of four and one-half per cent per annum, payable semi-annually on the first days of February and August of each year, until 1960, when the bond matured. Coupons were attached to the bond for interest payments, which were to be presented and surrendered to the respondent. (R. 6.)

On February 1, 1934, the petitioner duly presented one of the said coupons, maturing on said date, which called for the payment of the nominal sum of $22.50, payable in gold as above set forth. (R. 4.) He demanded payment in gold, or if such payment were impossible, then payment by legal tender in the equivalent of gold. (R. 4.) The equivalent would be $38.10, because by the "Gold Reserve Act of 1934" (See Appendix B) and the proclamation of the President of the United States issued pursuant to it on January 31, 1934, (See Appendix C) the standard gold dollar was fixed to consist of 15 5/21 grains weight, nine-tenths fine, whereas the weight on February 1, 1930, was 25.8 grains, nine-tenths fine. (R. 4.)

The respondent refused to pay gold or its equivalent, (R. 4) but offered merely the nominal amount of the coupon, in coin or currency of the United States, other than gold coin and gold certificates. (R. 10.) This action was therefore begun in the Supreme Court of the State of New York demanding that the petitioner should be awarded a judgment for the sum of $22.50 in gold coin of the United States of the standard of weight and fineness existing on February 1, 1930, or in the alternative for $38.10, representing the equivalent under the standard of weight and fineness existing on February 1, 1930. (R. 5.)

The answer of the Baltimore & Ohio Railroad Company admitted all the allegations of the complaint (R. 9) but set up as an affirmative defense that by Public Resolution No. 10 of the Seventy-third Congress (See Appendix A) and other acts of Congress and the executive action pursuant thereto, it was prevented and prohibited from fulfilling its contract, and that it was authorized and required to pay only legal tender, dollar for dollar, in the nominal and face amount of the bond and coupon and that it offered to pay same to petitioner. The petitioner, in his reply admitted that such offer was made, but was refused by him. (R. 9.)

The petitioner moved to strike out the affirmative defense on the ground that Public Resolution No. 10 was unconstitutional and for judgment on the pleadings. (R. 2.) Respondent also moved for judgment on the pleadings. (R. 11.) Petitioner's motion to strike out the affirmative defense was denied on the ground that Public Resolution No. 10 is constitutional, and a judgment rendered in favor of petitioner for $22.50,

the face amount of the coupon. (R. 12.) Under the pleadings, plaintiff was concededly entitled to a judgment in this amount. The judgment, therefore, although nominally in favor of petitioner, was actually in favor of respondent, since for an amount concededly due petitioner under any theory of the case.

The petitioner having felt aggrieved that he did not receive more than the nominal sum of $22.50 appealed to the Appellate Division of the said Supreme Court. (R. 1.)

That court affirmed the order and judgment of the lower court, one justice not participating. (R. 14.) Petitioner then appealed to the Court of Appeals. The Court of Appeals affirmed the lower Court, one judge dissenting, and two not participating. (R. 16.) An opinion was written by the Chief Judge (R. 20) upholding Public Resolution as constitutional. Judgment was accordingly entered in the Supreme Court of the State of New York on the remittitur of the Court of Appeals. (R. 18, 19.)

Reasons for Granting the Writ.

1. The decision of the Court below, a State court, should be reviewed, because it has decided a federal question of substance not heretofore determined by this court. This court has never passed upon the constitutionality or effect of Public Resolution No. 10 of the Seventy-third Congress. It is a federal question of substance which involves the validity of the "gold clauses" contained in billions upon billions of dollars in private obligations.

2. The decision of the court below should be reviewed because its interpretation of the contract for payment in gold is not in accord with the applicable decisions of this court. This court previously held that obligations calling for payment in specie must be discharged by such payment. (Bronson vs. Rodes, 7 Wall. 229; Trebilcock vs. Wilson, 12 Wall. 229.)

3. The decision of the court below should be reviewed because it decided a federal question of substance, not heretofore passed upon by this court. This court has never decided whether payment in legal tender of an amount equivalent to the value of the specie, when payment in specie is impossible to perform, can be required as a discharge of the obligation. This court in Butler vs. Horwitz, 7 Wall. 258 has intimated that such payment could be required as a discharge of the obligation.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, New York County, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this court; that the judgment of court below be reversed, and that the Petitioner be granted such other and further relief as may seem proper.

NORMAN C. NORMAN,
By EMANUEL REDFIELD,
Attorney for Petitioner.

July 27, 1934.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Appeals (R. 20) is reported in 265 N. Y. 37. The said Supreme Court of the State of New York and the Appellate Division thereof did not write any opinions.

Jurisdiction.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 344) since this is a cause wherein a final judgment has been rendered or passed on by the highest court of a State in which a decision would be had where is drawn in question the validity of a statute of the United States. The date of the judgment of the court below to be reviewed is July 9, 1934.

Statement of the Case.

A statement of the case appears in the foregoing petition for the writ, and for the sake of brevity is here omitted.

Specification of Errors.

1. That the court below erred in denying petitioner's right to demand the payment of gold coin of the United States of the weight and fineness existing on February 1, 1930, or the equivalent thereof under a true construction of the "gold clause" contained in the obligation.

2. The court below erred in holding that Public Resolution No. 10 of the Seventy-third Congress was constitutional and within the power conferred upon Congress under the United States Constitution and was not a violation of the Tenth Amendment thereof.

3. The court below erred in holding that Public Resolution No. 10 did not deprive the petitioner of his property without due process of law by impairing the obligation of his contract, taking his property for a private purpose and without compensation, denying him the equal protection of the laws, and by the unreasonable exercise of any power Congress might possess with regard to the subject matter.

4. That the court below erred in affirming the decisions of the said Supreme Court of the State of New York and of the Appellate Division thereof holding that petitioner was entitled to recover only $22.50 in legal tender, and denying petitioner the right to recover $22.50 in gold of the weight and fineness existing on February 1, 1930, or the equivalent thereof in legal tender, and in not holding to the contrary.

Argument.

POINT I.

The gold clause implies a payment in the equivalent of gold in the event performance with gold is impossible.

Under previous decisions of this court, obligations specifically requiring payment in specie were held dis-

chargeable only by the payment of gold and silver. It was held to be effective to that extent before and after the Legal Tender Act made paper money a medium for the discharge of obligations (Bronson vs. Rodes, 7 Wall. 229; Trebilcock vs. Wilson, 12 Wall. 687).

But at present the situation is different, because payment with gold cannot be performed, ownership of gold having been prohibited. Since payment in gold is impossible to perform, it is submitted, that the parties by their agreement had intended such performance by payment of an equivalent. Otherwise, it would mean that the respondent does not have to pay at all. The latter construction would be intolerable both from an equitable and economic view. The highest court of Great Britain recently held that a true construction of such obligation required payment in the equivalent of the value of gold. Feist vs. Société Interconmunale Belge D'Electricité, 150 L. T. Rep. 41 (1933). See also, Ortega vs. Triay, 260 U. S. 110, New York Central R. R. Co. vs. Gray, 239 U. S. 583.

POINT II.

Public resolution No. 10 of the Seventy-third Congress is unconstitutional.

The powers sought to be exercised by Congress are beyond the powers delegated to it by the Constitution and are reserved to the States. Nowhere in the Constitution can there be found any provision granting to Congress the power to invalidate the mode of payment of private contracts nor limit the extent of the obligation. Congress merely received the pow-

er to coin money, *i. e.*, designate what object in existence shall pass as currency. This is true both as to express and implied powers.

In that respect, it is to be distinguished from the decision in Knox v. Lee, 12 Wall. 651 and was so argued in the courts below. We submit that there is a vast difference between stating what object is currency, and stating what contracts calling for payment in a certain form shall no longer be payable in that manner, thereby destroying the obligation. The court below recognized that difficulty in its opinion (R. 21), and felt that the question should be resolved by this Court.

Assuming that the object of the law is legitimate, as Congress announced: that gold clauses interfered with its power to control the currency, the petitioner nevertheless submits that the means adapted for that purpose do not bear a fair relation to the end, and are not "plainly adapted." Since no power exists in Congress to enact the law, then no new power was created because of an emergency. Home Building & Loan Association vs. Blaisdell, 290 U. S. 54. Furthermore, there is no limitation of time here for the duration of the law. Worthen vs. Thomas, Adv. Op. Vol. 78, p. 975, 54 Sup. Ct. Rep. 816.

This court, too, in a number of cases has held that Congress cannot deprive the States of their reserved powers by subterfuge. Hammer vs. Dagenhart, 247 U. S. 251; Kidd vs. Pearson, 128 U. S. 1; United States vs. Chicago, etc. R. R. Co., 282 U. S. 311; United States vs. Fox, 95 U. S. 670; Bailey vs. Drexel Furniture Company, 259 U. S. 20.

3. The court below erred in refusing to hold Public Resolution No. 10 unconstitutional, in that it deprived the petitioner of his property without due process of law in violation of the Fifth Amendment of the United States Constitution. The public resolution without any warning made illegal that which had been legal and upon which persons relied in previously creating contracts to the extent of approximately one hundred billion dollars. Surely, under such circumstances, there could not be a "prophetic discernment" that such contracts would be invalidated.

The legislation also takes the petitioner's property and gives it to his debtor without compensation. We make no contention about that part of the resolution that pertains to public debts. We do, however assert that the nullification of the "gold clause" transferred and took petitioner's property for the benefit of his debtor. In so doing, Congress also made an unreasonable classification. McCray vs. United States, 195 U. S. 27, 61; Billings vs. United States, 232 U. S. 261, 283.

Conclusion.

It is respectfully submitted that the writ should be allowed.

EMANUEL REDFIELD,
DALTON DWYER,
Attorneys for the Petitioner.

July 27th, 1934.

Appendix A.

Public Resolution No. 10 of the Seventy-third Congress, Approved June 5, 1933.

"JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or

under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes', approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined and issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'"

Appendix B.

Gold Reserve Act of 1934.

(Public—No. 87—73d Congress, Approved January 30, 1934)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. That the short title of this Act shall be the "Gold Reserve Act of 1934."

SECTION 2. (*a*) Upon the approval of this Act all right, title, and interest, and every claim of the Federal Reserve Board, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion shall pass to and are hereby vested in the United States; • • •

• • • • •

SECTION 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (*a*) for industrial, professional, and artistic use; (*b*) by the Federal Reserve banks for the purpose of settling international balances; and, (*c*) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. • • •

• • • • •

SECTION 5. No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: *Provided, however,* That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C., title 31, sec. 367). All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct.

* * * * *

SECTION 12. Paragraph (*b*) (2), of section 43, title III, of the Act approved May 12, 1933 (Public, Numbered 10, Seventy-third Congress) is amended by adding two new sentences at the end thereof, reading as follows:

> "Nor shall the weight of the gold dollar be fixed in any event at more than 60 per centum of its present weight. The powers of the President specified in this paragraph shall be deemed to be separate, distinct, and continuing powers, and may be exercised by him, from time to time, severally or together, whenever and as the expressed objects of this section in his judgment may require, except that such powers shall expire 2 years after the date of enactment of the Gold Reserve Act of 1934 unless the President shall sooner declare the existing emergency ended, but the President may extend such period for not more than 1 additional year after such date by proclamation recognizing the continuance of such emergency."

* * * * *

SECTION 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States

or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed.

* * * * *

Appendix C.

A Proclamation
By the President of the United States of America

* * * * *

WHEREAS, I find, from my investigation, that, in order to stabilize domestic prices and to protect the foreign commerce against the adverse effect of depreciated foreign currencies, it is necessary to fix the weight of the gold dollar at 15 5/21 grains nine-tenths fine.

NOW, THEREFORE, be it known that I, FRANKLIN D. ROOSEVELT, President of the United States, by virtue of the authority vested in me by Section 43, Title III of said Act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare and fix the weight of the gold dollar to be 15 5/21 grains nine-tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation.

This proclamation shall remain in force and effect until and unless repealed or modified by act of Congress or by subsequent proclamation; and notice is hereby given that I reserve the right by virtue of the authority vested in me to alter or modify this proc-

lamation as the interest of the United States may seem to require.

IN WITNESS WHEREOF I have hereunto set my hand and have caused the seal of the United States to be affixed.

DONE in the City of Washington at 3:10 o'clock in the afternoon, Eastern Standard Time, this 31st day of January, in the year
(SEAL) of our Lord one thousand nine hundred and thirty-four, and of the Independence of the United States the one hundred and fifty-eighth.

FRANKLIN D. ROOSEVELT.

By the President:
CORDELL HULL,
Secretary of State.

Approved and effective January 31, 1934.